U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAR 18 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a secondary school mathematics teacher for Prince George's County Public Schools (PGCPS). At the time she filed the petition, the petitioner taught at Bladensburg High School, Bladensburg, Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
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> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 17, 2012. In an accompanying statement, counsel stated that the petitioner seeks the national interest waiver, but counsel did not address the guidelines set forth in *NYSDOT*. Instead, counsel listed the evidence submitted, and cited the petitioner's "Master's Degree in Teaching Mathematics, over twenty (20) years of progressive work experience . . . , and most importantly, the awards she received" from government bodies with oversight over various schools in the United States and the Philippines.

Degrees, experience, and recognition for achievements and contributions are all elements of a claim of exceptional ability. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B) and (F), respectively. Thus, counsel essentially claims that the petitioner merits a waiver as an alien of exceptional ability in her field. As noted previously, exceptional ability in the sciences, the arts or business is not sufficient to

warrant the national interest waiver. The plain wording of section 203(b)(2)(A) of the Act indicates that aliens of exceptional ability are, by default, subject to the job offer requirement (including labor certification).

In a personal statement, the petitioner described her background and listed her goals, such as "[t]o make education rigorous and relevant for all students and prepare them for their future filed [*sic*] in mathematics" and "to create a class website." Like counsel, the petitioner did not mention the *NYSDOT* guidelines. Instead, the petitioner stated: "I have resorted to this kind of application because my I-140 (Immigration Petition for Alien Worker) application to be attached to my approved PERM Labor certification was not accepted for filing, due to the issues committed by Public School System."

Regarding those "issues," the Department of Labor invoked the debarment provisions of section 212(n)(2)(C)(i) of the Act against owing to certain immigration violations by that employer. As a result, between March 16, 2012 and March 15, 2014, USCIS cannot approve any employment-based immigrant or nonimmigrant petitions filed by .[1] This debarment means that is, temporarily, unable to file its own petition on the alien's behalf, and thus explains why labor certification is not an option in the short term. The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the alien will serve the national interest to a substantially greater degree than do others in the same field. *NYSDOT*, 22 I&N Dec. at 218 n.5. Neither the Texas Service Center nor the AAO is responsible for the debarment, and those entities have no authority to override or modify it. When the Department of Labor has penalized a given employer for abuse of the immigration process, it is not self-evidently in the national interest to circumvent that penalty by granting immigration benefits directly to prospective foreign employees, without the safeguards built into the job offer/labor certification process. Any waiver must rest on the petitioner's individual qualifications, rather than on the circumstances that (temporarily) prevent from filing a petition on her behalf.

Materials in the record show that the petitioner's students have, on average, scored as "proficient" (the middle rank between "basic" and "advanced") on math examinations. An electronic mail message from indicated "a +5% increase from pre to post quiz scores" in the petitioner's class. Another document, with the heading stated that there was an "average +6% change" in "Pre-Quiz to Post-Quiz results" throughout the system, indicating that the improvement in the petitioner's class was slightly below the average system-wide improvement.

The petitioner submitted copies of various materials relating to her work, including certificates, evaluations, school newspaper articles and photographs. Similarly, several witness letters show that colleagues and administrators hold the petitioner in high regard. These materials demonstrate that the petitioner is a successful teacher, but they do not self-evidently set her apart from other competent and qualified teachers. The materials also do not show that the petitioner's work has or

[1] The list of debarred employers is available online at http://www.dol.gov/whd/immigration/H1BDebarment.htm (printout added to record March 13, 2013).

will directly result in significant benefits beyond her own classroom and the local school systems that have employed her.

The director issued a request for evidence on July 23, 2012. In that notice, the director acknowledged the intrinsic merit of the petitioner's occupation, but stated that the petitioner had not satisfied the other prongs of the *NYSDOT* national interest test. The director stated that the overall importance of the petitioner's field of endeavor does not, by itself, qualify the petitioner for the national interest waiver.

In response, the petitioner stated: "I am one of those 'Born to be a Teacher.' And to be a teacher you must be passionate to these young minds to help them learn and I can be a role model too." The petitioner, 61 years old at the time of the quoted letter, also stated: "I will be retiring soon, so please do extend my stay, so that within those years I can still help American students." The petitioner also asserted that she is her family's sole wage earner, and her spouse "suffers an acute illness" and relies on the petitioner's earnings "for his lifetime medications."

The AAO is not indifferent to difficulties that may face the petitioner and her family. Nevertheless, the national interest waiver is an employment-based immigration benefit rather than a form of humanitarian relief. Furthermore, the underlying immigrant classification requires substantial prospective benefit to the United States, even before one is eligible for consideration for the waiver. The petitioner's stated intention to retire within a few years necessarily limits the span during which the petitioner would be able to benefit the United States through her employment as a teacher. The petitioner cannot plausibly claim that she will produce national benefits in what remains of her teaching career without demonstrating that her past work has produced comparable results.

In an effort to establish the national scope of the benefit arising from the petitioner's work, counsel quoted part of the No Child Left Behind Act (NCLBA) and stated:

> given the bureaucratic collaboration by . . . Government Institutions and the level of concern directed by their efforts, the issue of whether the beneficiary's proposed employment as a "Highly Qualified Secondary School Mathematics Teacher" transcends the restrictive confines of physical and geographical limitation that normally applies to other kinds of employment. . . .
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> Here, the most tangible national benefit to be derived from a "Highly Qualified Secondary School Mathematics Teacher" is rebuilding a society of responsible and values-driven citizens including a highly productive and well-balanced work force that would translate the current recession adversely affecting the United States of America into a formidable economy again.
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> Hence, even if [the petitioner] would be fulfilling her duties and responsibilities within the geographical limitation of the [redacted] the benefits that would be conferred spreads to the entire nation's economy and security.

Counsel failed to explain how the actions of one teacher would contribute significantly to nationwide social reform and economic recovery. General assertions about the overall importance of education, and the need for education reform, do not exempt every teacher from the job offer requirement. As members of the professions (as defined in section 101(a)(32) of the Act), teachers are subject to the job offer/labor certification requirement set forth in sections 203(b)(2)(A) and (3)(C) of the Act. Likewise, aliens of exceptional ability who "will substantially benefit prospectively . . . the United States" are also subject to the job offer provision of section 203(b)(2)(A) of the Act. Congress created no blanket waiver for teachers. It is clear from the statute, therefore, that an alien who works in a beneficial profession such as teaching is not automatically or presumptively exempt from the job offer requirement, notwithstanding conjecture about what her students may achieve decades in the future.

Counsel listed various awards that the petitioner received and submitted previously, and stated that the "above awards and recognitions are difficult to ignore as solid evidence of [the petitioner's] competency to influence the improvement of Mathematics Education in the United States of America." Counsel did not elaborate further. The listed exhibits included some materials that have no demonstrated relationship to math education at all. For instance, the petitioner served as an advisor to a school journalism club in the Philippines that won several awards. None of the submitted exhibits establish that the petitioner has, so far, "influence[d] the improvement of Mathematics Education in the United States of America" except at the most local level at a handful of schools in . Even then, as noted previously, the evidence does not consistently show that the petitioner's work has resulted in greater improvement than that of other teachers. If the petitioner's influence is largely limited to those students whom she personally teaches, then she cannot satisfy the "national scope" prong of the *NYSDOT* national interest test.

Counsel quoted comments made by then-President George H. W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver. In those remarks, President Bush stated: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interprets this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not restricted to the creation of the waiver. It was, rather, an overhaul of the entire immigration structure, creating new employment-based immigrant classifications to replace the former "third preference" and "sixth preference" classifications previously in place. "[S]cientists and engineers and educators" are all members of the professions who, under the terms dictated by Congress in the Immigration Act of 1990 (as it amended the Act), are all subject to the job offer requirement.

Counsel contended that the labor certification process cannot take the petitioner's high level of credentials into account. The petitioner herself, however, had earlier acknowledged that had obtained an approved labor certification on her behalf. If the petitioner has admittedly already obtained labor certification, then there can be no credible claim that she is unable to do so.

The director denied the petition on October 27, 2012, stating: "The issue in this case is not whether teaching math students in is in the national interest, but whether the beneficiary, to a greater extent than U.S. workers having the same qualifications, plays

a significant role in the field." The director concluded: "The petitioner has not established that the impact of the beneficiary's activities will be national in scope."

On appeal, counsel notes that Congress passed the NCLBA three years after the issuance of NYSDOT as a precedent decision, and that therefore "[t]here is no longer vagueness or obscurity" on the question of whether "highly qualified teachers" serve the national interest. Counsel, however, identifies no special legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

The assertion that the NCLBA is tantamount to a retraction or modification of *NYSDOT* is not persuasive; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not made a persuasive claim that the NCLBA indirectly implies a similar legislative change.

Turning to immigration legislation, counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States."

(Counsel's emphasis.) Counsel, above, highlighted the abridged phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the section of relevant law that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the NCLBA, separately or in combination, create or imply any blanket waiver for teachers, and any attempt to fashion such a waiver out of the wording of the statutes must therefore fail.

Counsel asserted that the director "erred in disregarding evidence demonstrating the national scope of petitioner's proposed benefit through her [*sic*] effective role in serving the national educational interest of closing the achievement gap." Closing that gap is a national goal, but it does not follow that the petitioner's efforts toward that goal are, themselves, national in scope. Counsel did not show that the petitioner's individual work significantly "clos[ed] the achievement gap" outside of her own classroom. Counsel cited statistics showing "that out of the [redacted] school districts [redacted] ranked near the bottom" in 2012. By 2012, the petitioner had been working for [redacted] for

six years. The district's continued low ranking suggests that, even at the local level, the petitioner's efforts have not resulted in measurable overall improvements; the record does not show that the petitioner has transformed [redacted] into a model for other districts to emulate. Counsel does not explain how the petitioner's future work will "clos[e] the achievement gap" when there is no evidence that her past work has done so to any significant extent.

Counsel repeatedly asserts that the NCLBA requires schools to hire "Highly Qualified Teachers," and that USCIS thwarts this requirement by rigidly enforcing *NYSDOT*. Section 1114(b)(1)(C) of the NCLBA, 20 U.S.C. § 6314(b)(1)(C), dictates that "[a] schoolwide program shall include . . . [i]nstruction by highly qualified teachers." The regulation at 34 C.F.R. § 200.56 defines the term "highly qualified teacher." Counsel did not discuss the regulation or [redacted] state-specific requirements, or cite any evidence to show that the labor certification process does not permit the hiring of "highly qualified teachers." If, by law, a teacher must be "highly qualified" (which is the core of counsel's claim), then a teacher who does not meet the applicable requirements is not "minimally qualified." Rather, such a teacher is underqualified or unqualified. Counsel has not shown that the labor certification process has forced [redacted] or any other [redacted] jurisdiction to hire teachers who do not meet the requirements of "highly qualified teachers." Rather, because "highly qualified" is the statutory standard for such teachers, that term appears to be functionally equivalent to the term "minimally qualified" for purposes of labor certification.

Counsel denounces the labor certification process as "tedious," but the national interest waiver is not merely a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *NYSDOT*, 22 I&N Dec. 223. Furthermore, as noted previously, the petitioner herself acknowledges that the Department of Labor approved a labor certification on her behalf, which contradicts counsel's speculative assertions about what might result from the labor certification process. [redacted] debarment prevented the approval of a petition based on that approved labor certification, but counsel's claims about the unavailability of labor certification are unsupportable.

The director, in the request for evidence, had informed the petitioner that additional evidence was necessary in order to establish the significance of the various certificates that the petitioner had submitted. Counsel, on appeal, protests: "the Immigration Service is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. It remains that the petitioner's certificates do not facially establish eligibility for the national interest waiver. Counsel clearly considers these certificates to be significant, listing them again on appeal, while at the same time protesting that the petitioner need not explain how the certificates are significant. The director did not require the petitioner to establish exceptional ability in her field. Instead, the director made the reasonable request for the petitioner to show how the numerous certificates in the record serve to establish eligibility for the waiver. The petitioner failed to address that request, and counsel cannot mitigate that failure by claiming that the director went "over-board" by making the request in the first place.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest.

Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.